

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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UNITED STATES OF AMERICA, )

Plaintiff )

v. )

WILLIAM J. GALLAGHER, )  
EXECUTOR OF THE )  
ESTATE OF SARA NOZNESKY )

Defendant. )

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Civil Action No. 00-5707

Judge Waldman

**CONSENT DECREE**

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**CONSENT DECREE**

**I. BACKGROUND**

A. The United States of America ("United States" or "Plaintiff"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, ("CERCLA"), 42 U.S.C. § 9607, seeking reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the Kennett Square Junk Yard Superfund Site in Kennett Square, Chester County, Pennsylvania ("Site").

B. William J. Gallagher, Executor of the Estate of Sara Noznesky ("Settling Defendant") does not admit any liability to Plaintiff arising out of the transactions or

occurrences alleged in the complaint.

C. The United States has reviewed the Financial Information submitted by Settling Defendant to determine whether Settling Defendant is financially able to pay response costs incurred and to be incurred at the Site by the United States. Based upon this Financial Information, the United States has determined that Settling Defendant is able to pay the amounts specified in Section VI of this Consent Decree.

D. Because this Consent Decree, including a transferable covenant not to sue successors in interest and assigns that meet certain minimum criteria, has been under negotiation since September 2001, four (4) months prior to the enactment of the Small Business Liability Relief and Brownfields Revitalization Act, EPA and DOJ believe it is appropriate to finalize this settlement, including the transferable covenant not to sue, notwithstanding passage of that legislation.

E. The United States and Settling Defendant agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendant. Settling Defendant consents to and shall not challenge entry of this

Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

### **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States and upon Settling Defendant and its heirs. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

### **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, the terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement and Certification of Successor in Interest or Assign" shall mean an agreement relating to the Property or portion thereof in the form attached as Appendix B.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.

c. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

d. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the

period shall run until the close of business of the next working day.

e. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

f. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

g. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

h. "Existing Contamination" shall mean:

i. any hazardous substances, pollutants or contaminants present or existing on or under the Property, as such property is defined herein, as of the Effective Date of this Consent Decree;

ii. any hazardous substances, pollutants or contaminants that migrated from the Property prior to the Effective Date of this Consent Decree; and

iii. any hazardous substances, pollutants or contaminants present at the Site that migrate onto or under or from the Property after the Effective Date of this Consent Decree but only if the Successor in Interest or Assign did not or does not cause or exacerbate such migration.

i. "Fair Market Value" shall, except in the event of a foreclosure or transfer by deed or other assignment in lieu of foreclosure, mean the price at which the Property would change hands between a willing buyer and a willing seller under actual market conditions, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. In the event of a transfer by foreclosure, "Fair Market Value" shall mean the

amount obtained at the foreclosure sale. In the event of a foreclosure or a transfer by a deed or other assignment in lieu of foreclosure, "Fair Market Value" shall mean the balance of Settling Defendant's mortgage on the Property at the time of the transfer.

j. "Financial Information" shall mean those documents contained in the probate file Numbers 1579-0200 and 1599-0948 for the Estate of Charles Noznesky and the Estate of Sara Noznesky, respectively located at the Orphans' Court in Chester County, Pennsylvania.

k. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

l. "Net Sales Proceeds" shall mean the total value of all consideration received by Settling Defendant for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) less i) the balance of Settling Defendant's mortgage on the Property; ii) closing costs, including any real estate commissions and the costs of any appraisals required by EPA pursuant to this Consent Decree, limited to those reasonably incurred and actually paid by Settling Defendant associated with the Transfer of the Property; and iii) federal and state taxes owed on the proceeds. Settling Defendant shall provide EPA with documentation sufficient to show the total value of all consideration received by Settling Defendant for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) at the time of each Transfer, the amount of the proceeds of the Transfer, and the

amounts corresponding to items i through iii, above. This documentation shall include, but not be limited to, the report of any appraisal required by EPA and arranged for by Settling Defendant, performed by an appraiser satisfactory to the Parties, upon appraisal assumptions satisfactory to the Parties. The documentation shall also include, either as part of the report or separately, 1) a tax statement showing the assessed valuation of the Property for each of the three years immediately preceding the Transfer, and 2) a schedule showing all outstanding indebtedness on the Property. EPA may, in its unreviewable discretion, waive the appraisal requirement.

m. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

n. "Parties" shall mean the United States and the Settling Defendant.

o. "Plaintiff" shall mean the United States.

p. "Property" shall mean that portion of the Site that was owned by Settling Defendant as of November 9, 2000. The Property is located in Kennett Square, Chester County, Pennsylvania, and is designated by parcel numbers 62030081 and 03040164 identified in the Chester County Tax Assessor's Office.

q. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901-6991(i), (also known as the Resource Conservation and Recovery Act).

r. "Refund Proceeds" shall mean all payments, including interest received by the Settling Defendant from federal, state and local taxing authorities, that are the result of amending and/or revising inheritance, estate, and fiduciary tax returns that relate to the Estate of Sara Noznesky.



s. "Related Persons" shall mean the heirs and administrators of the Estate of Sara Noznesky.

t. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

u. "Settling Defendant" shall mean William J. Gallagher, Esquire in his capacity as the Executor of the Estate of Sara Noznesky, any successor Executor, and the Estate of Sara Noznesky.

v. "Site" shall mean the Kennett Square Junkyard Superfund Site, encompassing approximately 20 acres, located in Kennett Square, Chester County, Pennsylvania, and generally bounded to the east by the National Vulcanized Fiber Company Superfund Removal Site; railroad tracks and a mushroom farm to the south; the West Branch of the Red Clay Creek and an agricultural field to the west; and a light industrial/commercial area, including a food canning plant and supermarket to the north, and includes those locations where hazardous substances, pollutants or contaminants have come to be located. The Site is generally shown on the map included in Appendix A.

w. "Successor in Interest or Assign" shall mean any person who acquires an interest in the Property or portion thereof (including but not limited to an ownership or leasehold interest) and who signs an Agreement and Certification of Successor in Interest or Assign, the form of which is attached as Appendix B hereto. The term "Successor in Interest or Assign" shall include the Successor in Interest's or Assign's heirs, corporate successors or assigns, commissioners, officers, directors, employees and agents. Nothing in the Agreement and Certification of Successor in Interest or Assign or this Noznesky Consent Decree shall prohibit a

lessee, sublessee or any person conducting activities at the Property from entering into and signing the Agreement and Certification of Successor in Interest or Assign.

x. "Transfer" shall mean each sale, assignment, transfer or exchange by Settling Defendant (or its successors or heirs) of the Property, or any portion thereof, where title to the Property (or any portion or interest thereof) or to the entity owning the Property i) is transferred and Fair Market Value is received in consideration; ii) is transferred involuntarily by operation of law, including foreclosure and its equivalents following default on the indebtedness secured, in whole or in part, by the Property, including, but not limited to, a deed or other assignment in lieu of foreclosure; iii) is leased with an option to purchase wherein any part of the lease payments are credited towards the purchase price of the Property; or iv) is transferred in any other manner from the Settling Defendant to any other entity or person. A Transfer does not include a transfer pursuant to an inheritance or a bequest.

y. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### **V. STATEMENT OF PURPOSE**

4. By entering into this Consent Decree, the mutual objective of the Parties is for Settling Defendant to make a cash payment to address its liability for the Site as provided in the Covenant Not to Sue by United States in Section VIII, and subject to the Reservations of Rights by United States in Section IX, and to provide a mechanism to protect Successors in Interest and Assigns from potential liability under CERCLA that could otherwise result from acquiring an interest in the Property or portion thereof so as to facilitate the return of the Property to productive use.

## **VI. PAYMENT OF RESPONSE COSTS**

5. Within thirty (30) days of entry of this Consent Decree, Settling Defendant shall pay to the EPA Hazardous Substance Superfund \$100,000.00 in accordance with Paragraph 8.

6. **Payment of Proceeds of Sale of Property.**

a. Upon lodging of this Consent Decree with the Court, Settling Defendant shall immediately begin using its best efforts to sell the Property ("Best Efforts") for use in accordance with all applicable local, state, and federal laws and regulations. Upon the sale of the Property, Settling Defendant shall pay and assign to the EPA Hazardous Substance Superfund in accordance with Paragraph 8 one-hundred percent (100%) of the Net Sale Proceeds of the Transfer of the Property, but not to exceed the amount of EPA's unreimbursed Past Response Costs incurred in connection with the Site. Settling Defendant shall make all necessary arrangements with the title company or other entity conducting the closing on any Transfer of the Property, or portion thereof, to pay one hundred percent (100%) of the Net Sales Proceeds under this Paragraph 6.a as soon as practical after the closing. Until the wire transfer of funds to DOJ is completed pursuant to Paragraph 8, one hundred percent (100%) of the Net Sale Proceeds shall be held in an escrow account for the benefit of the EPA Hazardous Substance Superfund by the title company or other entity conducting the closing. In the event there is any dispute with regard to the closing costs and the Net Sales Proceeds, the disputed portions of the funds shall be held in escrow for the benefit of the Parties pending resolution of the dispute. Any undisputed closing costs shall be paid to the appropriate party at the time of closing. Any undisputed portion of the Net Sales Proceeds shall be paid to the EPA Hazardous Substance Superfund pursuant to Paragraph 8, as soon as practical after the closing.

- b. Best Efforts to sell the Property shall include, but not be limited to,
  - i) ensuring that the Property is sold for the highest price reasonably feasible;
  - ii) employing a real estate agent or broker who is licensed in the Commonwealth of Pennsylvania and who shall follow the usual and normal practices for selling real property, including, for example, listing the property in one or more real estate listing services regularly used by real estate agents, brokers, and others and using other reasonable means to ensure that the availability of the subject property for sale is known to potential buyers;
  - iii) selling the Property based upon a reasonably current appraisal, which shall not be more than two years old at the time of sale. EPA may waive this requirement in its unreviewable discretion;
  - iv) responding to the reasonable inquiries of prospective buyers;
  - v) maintaining the Property in a condition suitable for exhibition to prospective buyers;
  - vi) allowing the Property to be shown at all reasonable times; and
  - vii) assisting the broker, dealer or agent in any other reasonable way requested in an effort to sell the Property.
- c. Settling Defendant shall have two (2) years from the date of lodging of this Consent Decree to use Best Efforts to sell the Property.
- d. If, after the two-year period set forth in Paragraph 6.c, Settling Defendant

is unable to sell the Property, the United States shall have the right to select a broker, dealer or agent with respect to sale of the Property. If it exercises that right, the United States shall provide notice to Settling Defendant of the name, address and telephone number of the broker, dealer or agent the United States has selected.

e. Within fifteen (15) days after the United States notifies Settling Defendant of its selection of a broker, dealer or agent in accordance with Paragraph 6.c, Settling Defendant shall enter into a listing agreement on reasonable terms with the broker, dealer or agent selected by the United States and shall continue to use Best Efforts to sell the Property.

f. If the Property is not sold and Closing does not occur by the third anniversary of entry of this Consent Decree, Settling Defendant agrees to auction the Property to the highest bidder. Settling Defendant agrees to engage a professional auctioneer and to fully publicize the auction, by means of daily advertisements in local newspapers for twenty-one (21) days preceding the auction, as well as by all other appropriate and customary means. Any costs of an auction of the Property under this Paragraph 6.f shall be considered closing costs pursuant to Paragraph 3.1, above.

g. Settling Defendant shall timely provide to EPA and DOJ copies of all advertising published with respect to the Property, indicating when such advertising is/was displayed. Copies shall be considered timely if the copies of the advertising are sent to EPA and DOJ within thirty (30) days after such advertising is/was displayed.

h. At least thirty (30) days prior to any Transfer of the Property by Settling Defendant, Settling Defendant shall notify EPA of the proposed Transfer, which notice shall include a description of the property to be sold, the identity of the purchaser, the terms of the

Transfer, including the estimated closing costs, the consideration to be paid, a copy of the Transfer agreement, and the name and address of the title company or other entity conducting the closing. Settling Defendant shall notify EPA of the completion of the Transfer within ten (10) days after the date of closing and shall include with such notification a copy of the closing binder, including final executed documentation for the conveyance and a work sheet setting forth the Net Sales Proceeds and the amount payable to EPA.

i. In the event of a Transfer of the Property, or any portion thereof, Settling Defendant shall continue to be bound by all of the terms and conditions, and subject to all of the benefits, of this Consent Decree, unless this Consent Decree is modified in accordance with Section XVIII.

j. Unless the United States and Settling Defendant agree in writing otherwise: (a) Settling Defendant shall not hold a mortgage from the purchaser of the Property; and (b) Settling Defendant shall ensure that any contract for sale of the Property requires that the closing occur within sixty (60) days of satisfaction of all contingencies of the contract. The procedures and timetables set forth in Section VI, Paragraph 6 of this Consent Decree may be modified in writing by the Settling Defendant and EPA without modification pursuant to Section XVIII of this Consent Decree.

7. Payment of Refund Proceeds.

In addition to the payments made under Paragraphs 5 and 6, Settling Defendant shall pay to the EPA Hazardous Substance Superfund 50% of all Refund Proceeds in accordance with Paragraph 8. Payment shall be made to the EPA Hazardous Substance Superfund within thirty (30) days of the receipt by Settling Defendant of every refund.

8. All payments required by Paragraphs 5, 6 and 7 shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 2000VO0316, the EPA Region and Site Spill ID Number 03 BQ, and DOJ Case Number 90-11-3-07086. Payments shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the Eastern District of Pennsylvania following lodging of the Consent Decree. Any payment received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day.

9. At the time of each payment, Settling Defendant shall send notice that payment has been made in accordance with Section XIV (Notices and Submissions), and to:

Office of the Regional Comptroller (3PM30)  
U.S. EPA Region III  
Attention: Barbara Borden  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

10. The total amount of each payment to be paid pursuant to Paragraphs 5, 6 and 7 shall be deposited in the EPA Hazardous Substance Superfund.

11. Three (3) years after the receipt of the last Refund Proceed or a determination by the Settling Defendant that there is no remaining Refund Proceed, the Settling Defendant shall submit to Plaintiff a sworn statement indicating that neither Settling Defendant nor any Related Person has received any additional Refund Proceed and that it expects no additional Refund Proceed.

## **VII. FAILURE TO COMPLY WITH CONSENT DECREE**

12. Interest on Late Payments. If Settling Defendant fails to make any payment under

Paragraphs 5, 6 or 7 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

13. Stipulated Penalty.

a. If any amounts due under Paragraphs 5, 6 and 7 are not paid by the required date, Settling Defendant shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 12, \$500.00 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within thirty (30) days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number 03 BQ and DOJ Case Number 90-11-3-07086 and shall be sent to:

U.S. EPA Region III  
Attention: Superfund Accounting  
P.O. Box 360515  
Pittsburgh, PA 15251-6515  
EPA Superfund

c. At the time of each payment, Settling Defendant shall send notice that payment has been made to EPA and DOJ in accordance with Section XIV (Notices and Submissions) and to:

Office of the Regional Comptroller (3PM30)  
U.S. EPA Region III  
Attention: Barbara Borden



1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

and

Suzanne Canning (3RC00)  
Docket Clerk  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

d. Penalties shall accrue as provided in this Paragraph 13 regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due under either Paragraph 5, 6 or 7 and shall continue to accrue through the date of payment under either Paragraph 5, 6 or 7. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

14. If the United States brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time. However, if the action brought by the United States is litigated and the court issues an order ruling against the United States, then the Settling Defendant is not required to reimburse the United States for costs related to the issues upon which the United States did not prevail.

15. Payments made under this Section VII shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the requirements of this Consent Decree.

16. Notwithstanding any other provision of this Section VII, the United States may, in

its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendant from payment as required by Section VI or from performance of any other requirements of this Consent Decree.

### **VIII. COVENANT NOT TO SUE BY UNITED STATES**

17. Covenant as to Settling Defendant and Related Persons. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), with regard to the Site. The United States also covenants not to sue or take any other civil or administrative action against Related Persons pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) with regard to the Site, but only to the extent that such persons are alleged to be responsible persons at the Site solely due to their status as heir or administrator of the Estates of either Charles Noznesky or Sara Noznesky, and subject to the limitations in Section IX (Reservation of Rights by United States). With respect to present and future liability, these covenants shall take effect upon receipt by EPA of all amounts required by Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Consent Decree). These covenants not to sue are also conditioned upon the accuracy and completeness of the Financial Information provided to EPA by Settling Defendant. If the Financial Information is subsequently determined by EPA to be false or, in any material respect, inaccurate, Settling Defendant shall forfeit all payments made pursuant to this Consent Decree and these covenants not to sue and the contribution protection in Paragraph 28 shall be null and void. Such forfeiture shall not

constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from Settling Defendant's false or materially inaccurate information. These covenants not to sue extend only to Settling Defendant and to Related Persons to the limited extent provided above.

18. Covenant as to Successors in Interest or Assigns. Except as specifically provided in Paragraph 22 of Section IX (Reservation of Rights by United States with regard to Successors in Interest or Assigns), the United States covenants not to sue or take any other civil or administrative action (including but not limited to imposing or enforcing any liens on the Property pursuant to Sections 107(l) or 107(r) of CERCLA, 42 U.S.C. §§ 9607 (l) or 9607(r)), against a Successor in Interest or Assign for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), with respect to Existing Contamination, and to release any lien that it may have on the Property under Sections 107(l) or 107(r) of CERCLA, 42 U.S.C. §§ 9607(l) or 9607(r), as a result of response actions conducted at the Property, if prior to or simultaneously with the sale, lease or conveyance of the Property or portion of the Property, the Successor in Interest or Assign signs the Agreement and Certification of Successor in Interest (the form of which is attached as Appendix B). This covenant not to sue is subject to the following conditions:

a. The Agreement and Certification of Successor in Interest or Assign signed by the Successor in Interest or Assign must exactly duplicate the form attached as Appendix B, unless otherwise agreed by EPA, and thereby the Successor in Interest or Assign certifies and agrees to the following:

i. The Successor in Interest or Assign must certify to EPA that to the

best of its knowledge and belief, it has not caused or contributed to a release or threat of a release of hazardous substances or pollutants or contaminants to, at or from the Site; and that it was not a past owner or operator of the Property;

ii. With respect to Existing Contamination, the Successor in Interest or Assign shall agree to exercise due care at the Property, or the portion of the Property it will lease, own or otherwise have an interest in;

iii. With respect to Existing Contamination, the Successor in Interest or Assign shall agree to comply with all applicable local, state, and federal laws and regulations;

iv. The Successor in Interest or Assign shall acknowledge that it is purchasing Property where response actions may be required, and that the implementation of response actions at the Property may interfere with its use of the Property, and may require closure of its operations or a part thereof. The Successor in Interest or Assign shall agree to cooperate fully with EPA in the implementation of response actions at the Site and not to interfere with such response actions. EPA will, consistent with its responsibilities under applicable law, use reasonable efforts to avoid or minimize any interference with the operations of Successor in Interest or Assign, or the operations of the Successor in Interest's or Assign's lessees, sublessees, contractors and agents, by implementation of such response actions;

v. The Successor in Interest or Assign shall agree that in the event the Successor in Interest or Assign becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Property, or the portion of the Property it owns, leases or otherwise has an interest in that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, it will immediately take all appropriate action as required by law to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release or threatened release; and

vi. The Successor in Interest or Assign shall agree to the terms and conditions of this Consent Decree set forth in Paragraph 18 of Section VIII (Covenant as to Successor in Interest or Assign), Paragraph 22 of Section IX (Reservation of Rights by United States with regard to Successors in

Interest or Assigns), Paragraph 30 of Section XI (Effect of Settlement/Contribution Protection), and Sections IV (Definitions) and XV (Retention of Jurisdiction) of this Consent Decree to the extent they are specifically applicable to a Successor in Interest or Assign.

b. With respect to a Successor in Interest or Assign which purchases, leases or otherwise obtains an interest in all or any portion of the Property from the Settling Defendant, this covenant not to sue shall take effect upon: (i) tender of payment by Successor in Interest or Assign at closing for the transfer of the Property, or portion thereof, that Successor in Interest or Assign is acquiring; and (ii) the receipt by EPA of an Agreement and Certification of Successor in Interest or Assign setting forth the foregoing certifications, representations, and agreements, in the form attached as Appendix B, which has been fully executed and certified by the Successor in Interest or Assign or its authorized corporate official or other representative.

c. For subsequent Successors in Interest or Assigns, which purchase, lease or otherwise obtain an interest in all or any portion of the Property from a prior Successor in Interest or Assign, this covenant not to sue shall take effect upon the receipt by EPA of an Agreement and Certification of Successor in Interest or Assign setting forth the foregoing certifications, representations, and agreements, in the form attached as Appendix B, which has been fully executed and certified by the Successor in Interest or Assign or its authorized corporate official or other representative.

d. In the event any representation or certification in Paragraph 7(a) of the Agreement and Certification of Successor in Interest or Assign submitted by a Successor in Interest or Assign (described in subparagraph (a)(i) above) is materially inaccurate or incomplete, the covenant not to sue in this Paragraph 18 shall be null and void with respect to

such Successor in Interest or Assign, and the United States reserves all rights it may have against such Successor in Interest or Assign.

e. The covenant not to sue in this Paragraph 18 does not extend to any person other than a Successor in Interest or Assign which has executed the Agreement and Certification of Successor in Interest or Assign, the form of which is attached at Appendix B.

#### **IX. RESERVATION OF RIGHTS BY UNITED STATES**

19. **Reservation of Rights with regard to Settling Defendant and Related Persons.**

The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant and Related Persons with respect to all matters not expressly included within the Covenant Not to Sue by United States in Section VIII, Paragraph 17 (Covenant as to Settling Defendant and Related Persons). Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant and Related Persons with respect to:

- a. liability for failure of Settling Defendant or Related Person to meet a requirement of this Consent Decree;
- b. any liability resulting from exacerbation by Settling Defendant or a Related Person of Existing Contamination;
- c. any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, by Settling Defendant or a Related Person at the Site after the Effective Date of this Consent Decree, not within the definition of Existing Contamination;
- d. liability arising from the past, present, or future disposal, release or threat

of release of a hazardous substance, pollutant, or contaminant outside of the Site;

- e. criminal liability;
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; and
- g. liability of a Related Person arising under CERCLA other than that solely attributable to its status as an heir or administrator of the Estates of either Charles Noznesky or Sara Noznesky.

20. Notwithstanding any other provision of this Consent Decree, EPA reserves, and this Consent Decree is without prejudice to, the right to reinstate or reopen this action, or to commence a new action against Settling Defendant or Related Persons seeking relief other than as provided in this Consent Decree, if the Financial Information provided by Settling Defendant, or the financial certification made by Settling Defendant in Paragraph 41, is false or, in any material respect, inaccurate.

21. The covenant not to sue Related Persons in Paragraph 17 shall be null and void if the Related Person sues or asserts any type of claim or cause of action against the United States described in Paragraph 24.

22. Reservation of Rights with regard to Successors in Interest or Assign. The United States reserves, and this Consent Decree is without prejudice to, all rights against a Successor in Interest or Assign with respect to all matters not expressly included within the Covenant Not to Sue by United States in Section VIII, Paragraph 18 (Covenant as to Successors in Interest or Assigns). Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against a Successor in Interest or Assign with respect to:

a. claims based on the failure of a Successor in Interest or Assign to meet a requirement of its Agreement and Certification of Successor in Interest or Assign or an applicable requirement of this Consent Decree;

b. any liability resulting from exacerbation by a Successor in Interest or Assign, its corporate successors, assigns, lessees or sublessees, of Existing Contamination;

c. any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Property or Site after the Effective Date of this Consent Decree, not within the definition of Existing Contamination;

d. any liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site;

e. criminal liability; and

f. any liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments incurred by federal agencies other than EPA.

23. With respect to any claim or cause of action asserted by the United States, the Settling Defendant, Related Person, or the Successor in Interest or Assign as applicable, shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

#### **X. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

24. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site or this Consent Decree, including but not limited to:



a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, as amended, 28 U.S.C. § 2412, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 31, these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 19 (c) - (f), but only to the extent that Settling Defendant's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

25. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

26. Settling Defendant agrees not to assert any CERCLA claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any other person. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Defendant.

## **XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

27. Except as provided in Paragraph 26, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree or a Successor in Interest or Assign. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Except as provided in Paragraph 26, the Parties expressly reserve any and all rights, defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto, other than a Successor in Interest or Assign.

### **28. Contribution Protection with regard to Settling Defendants and Related Persons.**

The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant and Related Persons are entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person with respect to Existing Contamination pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a). Except for claims for failure to comply with this Consent Decree, the “matters addressed” in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree, Paragraph 19 (Reservation of Rights as to Settling Defendant and Related Persons), in the event that the United States asserts rights against Settling Defendant within the scope of such

reservation.

29. Settling Defendant agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within ten (10) days of service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA and DOJ within ten (10) days after service or receipt of any Motion for Summary Judgment, and within ten (10) days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

30. Contribution Protection with regard to Successors in Interest or Assign. A Successor in Interest or Assign which executes the Agreement and Certification of Successor in Interest or Assign (the form of which is attached hereto as Appendix B) shall be entitled to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for matters addressed in the Agreement and Certification of Successor in Interest or Assign and the provisions of this Consent Decree applicable to a Successor in Interest or Assign. The “matters addressed” in this Consent Decree and the Agreement and Certification of Successors in Interest or Assign are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person with respect to Existing Contamination. Contribution protection under this Paragraph shall take effect as to a Successor in Interest or Assign at the same time that the United States’ covenant not to sue takes effect with respect to such Successor in Interest or Assign, as set forth in Paragraph 18.

31. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling

Defendant and Related Persons shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph 31 affects the enforceability or scope of the Covenant Not to Sue by United States set forth in Section VIII.

## **XII. INSTITUTIONAL CONTROLS, DUE CARE, ACCESS AND COOPERATION**

32. The Settling Defendant understands and acknowledges that Existing Contamination remains at the Property and that, therefore, the Property is subject to Institutional Controls, which are land use restrictions, controls or notices to ensure that CERCLA response actions remain protective of human health and the environment, as has been determined necessary by EPA and due care requirements. Accordingly, as a condition of this Consent Decree,

a. Settling Defendant shall notify in writing the Pennsylvania Department of Environmental Protection ("PADEP") prior to disturbing, excavating, removing or drilling soils located two or more feet below the ground surface at the Property as it existed on November 26, 2002, provided, however, that in the event that an emergency occurs requiring the disturbance of such soils, Settling Defendant shall notify PADEP as soon as practicable, but in no event later than three (3) business days after such emergency occurs;

b. Settling Defendant shall simultaneously send to EPA a copy of any notice that is sent pursuant to Section XII, Paragraph 32.a, immediately above;

c. Settling Defendant shall comply with all applicable local, state, and

federal laws and regulations during any activity described in Section XII, Paragraph 32.a, above; and

d. Within fifteen (15) days after the Effective Date of this Consent Decree, the Settling Defendant shall file the Notice of Institutional Controls, Due Care, Access and Cooperation ("Notice") attached as Appendix C to this Consent Decree with the Recorder of Deeds Office of Chester County, Commonwealth of Pennsylvania, and any other office where land ownership and transfer records are maintained for the Property. Settling Defendant shall attach a copy of this Consent Decree to the Notice. The recording shall be done in such manner as shall be effective to bring the Notice to the attention of any person examining or researching the state and/or quality of the title to the real property constituting the Property or searching for any encumbrances, covenants, easements, liens, restrictions, or other limitations relating to the Property. Such recording shall be made in the Grantor/Grantee and Lot/Block indices of the Land Records for the Property. Thereafter, each deed, title, or other instrument of conveyance for property executed by Settling Defendant regarding the Property, or any portion thereof, shall contain a notice concerning the existence of this Consent Decree, and shall reference the recorded location of the Notice; this Consent Decree; and any restrictions applicable to the Property under this Consent Decree. The Settling Defendant shall not modify or release such Notice without prior written approval of EPA. The Settling Defendant shall provide EPA with a certified copy of the recorded Notice within ten (10) days after recording such Notice.

33. In addition to complying with the requirements set forth in Paragraph 32, above, the Settling Defendant shall exercise due care with respect to Existing Contamination and shall comply with all applicable local, state, and federal laws, and regulations with respect to the Site.

Settling Defendant shall refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity or protectiveness of any response actions performed or to be performed at the Site.

34. If the Site, or any other property where access is needed to implement response actions at the Site, is owned or controlled by Settling Defendant, Settling Defendant shall, commencing on the date of lodging of this Consent Decree, and thereafter, provide the United States and its representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

- a. Monitoring, investigation, removal, remedial or other activities at the Site;
- b. Verifying any data or information submitted to the United States;
- c. Conducting investigations relating to the release or threatened release of hazardous substances at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing additional response actions at or near the Site;
- f. Assessing Settling Defendant's compliance with this Consent Decree; and
- g. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree.

35. The Settling Defendant recognizes that in the event further response action(s) become necessary, the implementation of such response actions at the Site may interfere with the

Settling Defendant's use of the Property, and may require closure of its operations or some part thereof. The Settling Defendant agrees to cooperate fully with EPA in the oversight or implementation of response actions at the Site and further agrees not to interfere with such oversight or response actions. EPA agrees, consistent with its responsibilities under applicable law and as provided by Paragraph 34, to use reasonable efforts to minimize or avoid any interference with the Settling Defendant's operations by such entry, oversight, and/or response. This provision should not be construed to limit EPA's response authority under CERCLA or any other statutory provision.

36. In the event the Settling Defendant becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, the Settling Defendant shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release or threatened release.

37. The Settling Defendant shall ensure that any of its agents or representatives performing activities at the Site comply with the requirements set forth in this Section XII.

38. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulation.

### **XIII. RETENTION OF RECORDS AND CERTIFICATION**

39. Until seven (7) years after the entry of this Consent Decree or such shorter time as specified through written notice by Settling Defendant to EPA, Settling Defendant shall preserve and retain all records now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

40. After the conclusion of the document retention period in the preceding paragraph, Settling Defendant shall notify EPA and DOJ at least ninety (90) days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendant shall deliver any such records to EPA. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

41. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it



regarding the Site, and that it has fully complied with any and all EPA requests for information regarding the Site and Settling Defendant's financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927; and

b. submitted to EPA Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time Settling Defendant executes this Consent Decree.

#### **XIV. NOTICES AND SUBMISSIONS**

42. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, and Settling Defendant, respectively.

As to the United States:

As to DOJ:  
Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ # 90-11-3-07086 )  
P.O. Box 7611  
Washington, D.C. 20044-7611

As to EPA:  
Michael Hendershot, Esq. (3RC43)  
U.S. EPA Region III  
Office of Regional Counsel

1650 Arch Street  
Philadelphia, PA 19103-2029

As to Settling Defendant:

Lance J. Nelson, Esq.  
MacElree Harvey, Ltd.  
17 West Miner Street  
P.O. Box 660  
West Chester, PA 19381-0660

**XV. RETENTION OF JURISDICTION**

43. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

**XVI. INTEGRATION/APPENDICES**

44. This Consent Decree and its appendices constitute the final, complete and exclusive Consent Decree and understanding between the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the map of the Site;

“Appendix B” is the Agreement and Certification of Successor in Interest or Assign.

“Appendix C” is the Notice of Institutional Controls, Due Care, Access and Cooperation.

**XVII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

45. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. The United States reserves the right to withdraw

or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

46. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any party and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

#### **XVIII. MODIFICATION**

47. Except as otherwise provided in this Consent Decree, no modifications shall be made to the provisions and requirements of this Consent Decree without written notification to and written approval of the United States, Settling Defendant, and the Court.

#### **XIX. SIGNATORIES/SERVICE**

48. Each undersigned representative of Settling Defendant to this Consent Decree and the Deputy Chief, Environmental Enforcement Section for the Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

49. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

50. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby

agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

**XX. FINAL JUDGMENT**

51. Upon approval and entry of this Consent Decree by the Court (which date shall be the “Effective Date” of this Consent Decree), this Consent Decree shall constitute the final judgment between the United States and Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of U.S. vs. William J. Gallagher, Executor or the Estate of Sara Noznesky, Civil Action Number: 00-CV-5707, relating to the Kennett Square Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: \_\_\_\_\_

*Acting*  
~~THOMAS L. SANSONETTI~~  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

~~KIMBERLY J. SABO~~  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

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PATRICK L. MEEHAN  
United States Attorney  
Eastern District of Pennsylvania

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VIRGINIA A. GIBSON  
Assistant United States Attorney, Civil Chief

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NURIYE C. UYGUR  
Assistant United States Attorney  
Eastern District of Pennsylvania  
615 Chestnut Street, Room 1250  
Philadelphia, PA 19106

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DONALD S. WELSH  
Regional Administrator  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

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WILLIAM C. EARLY  
Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

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MICHAEL A. HENDERSHOT  
Senior Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of William J. Gallagher, Executor of the Estate of Sara Noznesky, Civil Action No. 00-CV-5707, relating to the Kennett Square Junkyard Superfund Site.

FOR DEFENDANT:

Date: 9/8/03

William J. Gallagher, Esquire  
Executor, Estate of Sara Noznesky  
MacElree Harvey, Ltd.  
17 West Miner Street  
Post Office Box 660  
West Chester, PA 19381-0660

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Lance J. Nelson, Esquire

Title: Attorney

Address: MacElree Harvey, Ltd.  
17 West Miner Street  
Post Office Box 660  
West Chester, PA 19381-0660